

Export Controls Briefing HQ Task Group Update

Deemed Exporting Issues Resulting from IG Audits

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Historical Prospective

Initial Action

- ***National Defense Authorization Act*** for Fiscal Year 2000 (2000 through 2007)
- Subsequent Actions
- ***IG Audit Department of Energy***, IG-0645 Deemed Export Controls 4/2004
- ***IG Audit Department of Defense***, D-2004-061 Export Controls 3/2004
- ***IG Audit Department of Commerce***, IPE-16176 Deemed Export Controls 3/2004
- ***Interagency Review*** of Foreign National Access to Export Controlled Technology in the United States, for the Departments of Commerce, Defense, Energy, Homeland Security, State and CIA

Introduction

- **Department of Energy** – Deemed Exports at DOE Facilities, focus was placed on the FV&A Notice which was reissued as an Order 142.3
- **Department of Defense** – Proposed DFARS Clause, which is presently being implemented, focus on DOD providing EC guidance to its subcontractors & flowing down the Requirements to Lower -tier
- **Department of Commerce** – Proposed Rule Making Change
 - Exemptions – PA & FR, Open Source Software, Education, Patents, etc. concern about exemptions compromising NS
 - Country of Origin – Evaluate FN by birth place rather than most recent citizenship
 - Definition of “Use” Technology – This is the big issue!

Use Technology Definitions

What is "technology"?

"Technology" is specific information necessary for the "development," "production," or "use" of a product. The General Technology Note states that the "export of technology is controlled according to the provisions of each Category."

Development (General Technology Note)--"Development" is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.

Production (General Technology Note) (All Categories)-- Means all production stages, such as: product engineering, manufacture, integration, assembly (mounting), inspection, testing, quality assurance.

Use - Operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.

Industry, University & Interagency Task Group

Task Group was formed to address the pending Rule Making

Task Group Purpose:

Representatives from Industry, Universities, and Government Agencies formed a Task Group to address the recommendations of the IG Audits and the Practical Implications of the Pending Rules.

Representation includes:

- Academy of Science, National Institute of Health, National Science Foundation, Departments of Defense, Energy, Commerce, Nuclear Regulatory Commission, Universities such as California Institute of Technology, John Hopkins, Carnegie Mellon, Massachusetts Institute of Technology, Stanford, National Science Laboratories, and Others

Department Of Energy – Deemed Exports Highlights

- **Foreign National Visits/Assignments Policy** - Needs Clarification
- **Host Training** - Need to Implemented and/or Improved Host Training for Laboratory Employees
- **Review Access** – To Assure Export Control Technology/Information is Protected
- **Equipment** – To Assure Access Does Not Involve Technology/Information Transfer
- **DOE Order 142.3** – Issued as a result of the IG Audit

Department of Defense – Proposed DFARS Clause Highlights

- **Cited EAR & ITAR Regulations**
- **Contractor Shall Have an Effective Export Control Compliance Program**
 - * Access Control Plan (Badges) & Segregated Work Areas
 - * Restrict Access By FN to EC Technology/Information
 - * Training Program
 - * Conduct Assessments
- **Additional Recommendations**
 - * Include 10 CFR 810 & 110
 - * Clarification of Segregated Work Areas
- **This Clause is now being implemented**

Department of Commerce – Rule Making Change Highlights

- **Exemptions** (fundamental research, patent information, public available information) can be used by Foreign Nationals of Concern
- **Country of Origin versus Country of Birth Place** - Should One Consider a foreign national's country of origin or country birth place criteria for evaluating the export control restrictions associated with deemed exporting, exporting, and/or re-exporting
- **Definition of “Use” Technology** and its implications on Deemed Exporting – The present definition of “Use Technology” is “Operation, installation (including on-site installation), maintenance, (checking), repair, overhaul and refurbishing. The IG want to replace “and” with “and/or”.

Pending Issues & Questions

Definition of “Use” Technology and its implications on Deemed Exporting

Three issues need to be considered when looking at technology transfer and most equipment use.

- The first issue is the equipment itself. Is the operation and use of the equipment going to result in a technology transfer that empowers the individual to replicate or improve the equipment itself?
- The second issue is what is the equipment being used for? Computers are a perfect example. Simulation and modeling in many instances has nothing to do with the computer itself. As a tool its usefulness can involve fundamental research or weapons of mass destruction.
- Lastly what is not restricted by prohibition and end user/use restriction, fundamental research/publicly available information is not export controlled.

HQ Task Group Meetings

- Department of Commerce Received 309 Comments on the Federal Register Rule Making Notice dated March 28, 2005
- Argonne, Brookhaven and Oak Ridge Provided Coordinated Responses
- HQ Task Group reached agreement on Exemptions and Issue of Birthplace Quickly and Use Technology Surfaced as the Main Area of Concern
- HQ Task Group Worked on Several Possible Versions of the Definition(s) of Use Technology
- What ECCNs Would be Involved & What Definition of a Technology Transfer for Use of Equipment Should Be Used - Proved Challenging
- December 2005 Meeting focused on Implementation at the National Laboratory Level (thousands of foreign nationals, tens of thousands of pieces of equipment) to Highlight Implementation Challenges

Department of Commerce Rule Making Responses in Task Team Meeting 5/15/2006

Recommendations Provided Are:

- **Fundamental Research and Publicly Available Information** – This exemption will stand and DOC will clarify the definition and criteria applicable to this exemption
- **Country of Origin versus Country of Birth Place** - DOC will continue to use the Country Origin (Country Citizenship) or Country of Permanent Residence. This position makes more sense given that an individual's loyalties are more likely reflected in their choice of citizenship.
- **Definition of “Use” Technology** – DOC will continue to use the criteria of “operation, installation, maintenance, repair, overhaul, and refurbishing” instead of “operation, installation, maintenance, repair, overhaul, or refurbishing” in determining when export controlled “use technology” license may be required

The Remaining Slides are for Backup
Only in the event of specific questions

252.204-70XX Requirements Regarding Access to Export-Controlled Information and Technology. As prescribed in 204.7304, use the following clause:

Requirements Regarding Access to Export-Controlled Information and Technology (XXX 2005)

- (a) Definition. Export-controlled information and technology, as used in this clause, means information and technology that may only be released to foreign nationals or foreign persons in accordance with the Export Administration Regulations (15 CFR parts 730-774) and the International Traffic in Arms Regulations (22 CFR parts 120-130), respectively.
- (b) In performing this contract, the Contractor may gain access to export-controlled information or technology.
- (c) The Contractor shall comply with all applicable laws and regulations regarding export-controlled information and technology, including registration in accordance with the International Traffic in Arms Regulations.
- (d) The Contractor shall maintain an effective export compliance program. The program must include adequate controls over physical, visual, and electronic access to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required by applicable Federal laws, Executive orders, and regulations.
 - (1) The access control plan shall include unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology.
 - (2) The Contractor shall not allow access by foreign nationals or foreign persons to export-controlled information and technology without obtaining an export license, other authorization, or exemption.
- (e) The Contractor shall--
 - (1) Conduct initial and periodic training on export compliance controls for those employees who have access to export-controlled information and technology; and
 - (2) Perform periodic assessments to ensure full compliance with Federal export laws and regulations.
- (f) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to-- (1) The Export Administration Act of 1979 (50 U.S.C. App. 2401 as extended by Executive Order 13222); (2) The Arms Export Control Act of 1976 (22 U.S.C. 2751); (3) The Export Administration Regulations (15 CFR parts 730-774); (4) The International Traffic in Arms Regulations (22 CFR parts 120-130); (5) DoD Directive 2040.2, International Transfers of Technology, Goods, Services, and Munitions; and (6) DoD Industrial Security Regulation (DoD 5220.22-R).
- (g) The Contractor shall include the substance of this clause, including this paragraph (g), in all subcontracts for--
 - (1) Research and development; or
 - (2) Services or supplies that may involve the use or generation of export-controlled information or technology.

National Security Decision Directive -189

Fundamental Research Exclusion

- **“Basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.”**
- **Notes:**
 - A proprietary right to the information does not exist.
 - Proprietary design information, proprietary software, and hardware and materials are NOT within the fundamental research exclusion.